

Supreme Court, U.S.
FILED

MAY 21 1990

JOSEPH F. SPANIOLO, JR.
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No. 89-1645

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

M. MARK MENDEL,
DANIEL E. MURRAY, and M. MARK MENDEL, LTD.,
Petitioners,

v.

MARC I. SILVER,
Respondent.

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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COUNTERSTATEMENT OF CASE

Respondent, Marc I. Silver, made his living in the construction business, principally building nursing homes. Mr. Silver's income was derived not only from his construction businesses, but also from consulting fees paid by developers and owners of nursing homes and by equity participations with owners and developers of nursing homes. One of the subcontractors that worked for Mr. Silver was Barton Engineering ("Barton"). Petitioner M. Mark Mendel occupied the positions of owner, officer, and Chairman of the Board of Barton, and Petitioner Daniel E. Murray was also an officer of Barton. In late June of 1984 M. Mark Mendel, acting as owner and Chairman of the Board of Barton, commenced a series of meetings, phone conversations, and correspondence in which he threatened to destroy

Mr. Silver's business, to destroy his ability to earn a living, and to have Mr. Silver physically injured. Mr. Mendel confirmed in writing that these threats were made "after careful deliberation and evaluation." Petition for Writ of Certiorari ("Petition for Certiorari"), at 13A.

In December of 1984 Mr. Mendel made good on his threats to put Mr. Silver out of business. Petitioners M. Mark Mendel and Daniel E. Murray and Mr. Mendel's law firm filed a Petition for Involuntary Bankruptcy in Barton's name. They included on the Petition the names of two other creditors, neither of whom they ever represented and neither of whom had authorized the petitioners to file the Involuntary Bankruptcy Petition in their name. The Petition was ultimately dismissed because the petitioning creditors failed to post a bond as directed by the Bankruptcy Court, but the damage had been done. The filing of the Petition in and of itself resulted in widespread dissemination of Mr. Silver's alleged bankruptcy, and rendered Mr. Silver unable to obtain performance bonds necessary to carry on his contracting business. As a result, Mr. Silver personally lost development fees and equity interests for which he had been negotiating, he was prevented from the completion of certain contracts, and other contracts then in negotiation fell through. Additionally, Mr. Silver suffered personal embarrassment, humiliation, and severe mental and emotional distress. Petition for Certiorari, at 13A-14A.

Mr. Silver filed a six count Complaint. Count I alleged that Petitioners filed the Involuntary Bankruptcy Petition and publicized Mr. Silver's alleged bankruptcy with the knowledge and purpose to interfere with the contractual rights of Mr. Silver and with the intent to harm Mr. Silver. The Complaint identified specific contracts as having been lost as a result of the filing of the fraudulent Involuntary Bankruptcy Petition. Count II alleged that Mr. Silver had personally established a

reputation in the nursing home construction business, that he had developed a working relationship with developers and owners, and that, as a result of Petitioners' misconduct, Silver lost prospective consulting contracts and equity participations. Again, specific prospective contractual relationships were identified as having been destroyed by the Petitioners. Count III alleged a violation of a state statute defining the tort of wrongful use of civil proceedings. Count IV alleged RICO violations, specifying numerous predicate acts.¹ Count V stated a claim for intentional infliction of emotional distress, and Count VI a claim for negligence.

On March 25, 1987 the district court granted the Petitioners' motion to dismiss Counts I, II, IV, V, and VI, with only Count III remaining. Thus, the Order of March 25, 1987 was not a final Order. A request for certification of that Order under Rule 54(b) F.R.Civ.P. was denied.

By Order dated November 21, 1988 the district court granted Petitioners' motion for *judgment* on the pleadings, dismissed Count III of Respondent's Complaint, denied Respondent's motion to reinstate Counts I and II, and, because all claims had been fully and finally resolved in favor of Petitioners and against Respondent, entered a final and appealable *judgment*. The November 21, 1988 Order states:

"AND NOW, this 18th day of NOVEMBER, 1988, upon consideration of the defendants' motion for judgment on the pleadings and the plaintiff's cross motion to reinstate Counts I and II, it is

1. The RICO claims were previously before this Court in a companion case captioned *Marshall-Silver Construction Company, Inc. and Silver Construction Company, Inc. v. M. Mark Mendel, Daniel E. Murray and M. Mark Mendel, Ltd.*, No. 88-7103 ("*Marshall Silver*"). The Court granted Marshall-Silver's Petition for Certiorari and vacated and remanded for reconsideration in light of *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989). That Order is reported at 109 S. Ct. 3233-34 (1989).

ORDERED

1. that defendants' motion is GRANTED and *JUDGMENT is entered in favor of the defendants M. Mark Mendel, Individually, Daniel Murray, Individually, and M. Mark Mendel, Ltd. and against the plaintiff Marc I. Silver.*

2. that the plaintiff's motion to reinstate Counts I and II is DENIED.

(Emphasis added)

On December 13, 1988 Mr. Silver filed a Notice of Appeal which reads as follows:

"Notice is hereby given that Marc I. Silver, plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit *from the Order entered in this action on November 21, 1988.* A copy of the Memorandum and Order entered on November 21, 1988 is attached hereto." (Emphasis added).

On December 21, 1988, the thirtieth day after the entry of the Court's November 21, 1988 judgment, Mr. Silver filed and served on Petitioners the Civil Appeal Information Statement (*See* page A-1, *infra*) which, under the heading "Issues Proposed To Be Raised On Appeal", read as follows:

- "(1) Whether the District Court erred in dismissing for failure to state a claim upon which relief can be granted — and in later refusing to reinstate — the claims for interference with contractual relations, both without explanation?
- (2) Whether the District Court erred in dismissing for failure to state a claim upon which relief can be granted the negligence claim without explanation?

- (3) Whether the District Court erred in dismissing for failure to state a claim upon which relief can be granted the claim for malicious prosecution?
- (4) Whether the District Court erred in dismissing for failure to state a claim upon which relief can be granted the RICO claim?"

Further specificity was supplied six days later in the Statement of Issues Proposed to Be Presented on Appeal (see page A-2, *infra*).

Petitioners moved to dismiss Respondent's appeal insofar as it sought review of the non-final Order of March 25, 1987. The Motion to Dismiss was referred to the Merits Panel, decided by the Third Circuit after full briefing and oral argument, and is discussed in Section III of the Third Circuit Opinion. See Petition for Certiorari, 14A-15A. The Third Circuit held that the Notice of Appeal fully complied with Rule 3(c), F.R.A.P., and that review of the November 21, 1988 Order that entered *judgment* in petitioners' favor included a review of all decisions of the district court necessary to that judgment.

The Third Circuit then considered on the merits the various counts of the Complaint, reversed the judgment of the district court with respect to Counts I, II, and V and remanded for further proceedings. Since Respondent had fully complied with Rule 3(c), the Court found no occasion to address the doctrine of harmless error or this Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

Contrary to the assertions made by Petitioners, there is no conflict among the Circuits with respect to the application of Rule 3(c), F.R.A.P., to the Notice of Appeal specifying an appeal from the order that entered final judgment in this case. With respect to the substantive law issues raised by the Petition for Certiorari, reference to the Third Circuit Opinion discloses that the Third Circuit specifically followed the decisions of the

**STATEMENT OF ISSUES TO BE PRESENTED
ON APPEAL**

1. (a) Is a lawyer privileged or immune from suit for interference with contractual relations or prospective contractual relations?

(b) Is a businessman privileged or immune from suit for interference with contractual relations or prospective contractual relations?
2. (a) Is a lawyer privileged or immune from suit for wrongful use of civil proceedings?

(b) Is a businessman privileged or immune from suit for wrongful use of civil proceedings?
3. (a) Is a lawyer privileged or immune from suit for intentional infliction of emotional distress?

(b) Is a businessman privileged or immune from suit for intentional infliction of emotional distress?
4. Does the sole shareholder of a corporation have standing to maintain an action for wrongful use of civil proceedings against persons, who by means of false and fraudulent pleadings and sworn testimony commenced and attempted to prosecute, an involuntary bankruptcy which destroyed his corporation and his personal livelihood?
5. Is the businessman privileged or immune from liability for acts of negligence carried out in his capacity as a businessman merely because he is also a lawyer?
6. Did the District Court err in dismissing (without opinion) plaintiff's RICO claim where the Complaint alleged that:

- (a) Defendants conducted an enterprise (distinct from the defendants themselves) through a pattern of racketeering activity?
 - (b) Defendants committed predicate acts of obstruction of justice, mail fraud, threats made both in person and through the mails, the filing of a fraudulent Petition for Involuntary Bankruptcy, false testimony under oath during a Bankruptcy Hearing, and violations of the Pennsylvania statutes outlawing conspiracy and attempted theft by extortion and the making of false and misleading statements; and
 - (c) Defendants' conduct resulted in injury to plaintiff's business and property (in this case destruction of plaintiff's livelihood).
7. In the alternative, did the District Court err by not permitting Appellant leave to amend his Complaint where plaintiff in his Brief offered to amend the Complaint to meet with most restrictive definition of a "pattern of racketeering" even though this Court has not required such restrictive pleading?